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No.

Supreme Court, U.S.
FILED
MAY 23 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE
Supreme Court of the United States

APRIL TERM, 1986

ROBERT E. LAFOUNTAIN

Petitioner,

v.

TOWN OF SARATOGA, a Wyoming Municipal Corporation and SUE ELLIS, JOE GLOBE, JIM ELSENSOHN and DORMAN EWING as members of the Saratoga Town Council and each of the aforementioned individually, personally, jointly and severally,

Respondents,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

ROBERT E. LAFOUNTAIN, PETITIONER
PRO-SE
908 Crist Drive
Billings, Montana 59105
(406) 248-2948

10 pp

QUESTION PRESENTED FOR REVIEW

Whether the Circuit Court of Appeals for the Tenth Circuit erred in its dismissal of the Appeal of Petitioner Robert E. LaFountain as untimely and consequently ineffective to vest the Circuit Court with appellate jurisdiction.

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TOWN OF SARATOGA, a Wyoming Municipal Corporation and SUE ELLIS, JOE GLODE, JIM ELSENSOHN and DORMAN EWING as members of the Saratoga Town Council and each of the aforementioned individually, personally, jointly and severally,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Robert E. LaFountain hereby respectfully petitions the United States Supreme Court for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINION BELOW

The order and judgment of the Circuit Court of Appeals for the Tenth Circuit was entered on February 26, 1986 and a copy is reproduced in Appendix A to the Petition at 1a. The Circuit Court determined that the time prescribed by Fed. R. App. P. 4 (a) (1) and 28 U.S.C. § 2107 for filing a proper notice of appeal expired on November 8, 1985 and that Appellant's notice of appeal was not filed until November 12, 1985. The Court stated further, that the rules in this type of case are quite clear and that a notice of appeal filed within the time prescribed by statute, or a proper extension thereof, is both mandatory and jurisdictional and that Petitioner's appeal was untimely and ineffective to vest the Court of Appeals with Appellate jurisdiction.

JURISDICTION

The judgment of the Court of Appeals was entered on February 26, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

STATUTES, TREATIES AND OTHER LAWS INVOLVED

The issues in the present case concern principally the statute 28 U.S.C. § 2107 and Fed. R. App. P. 4 (a) (1).

STATEMENT OF THE CASE

Petitioner Robert E. LaFountain, Plaintiff-Appellant below, filed a Notice of Appeal of the Order Granting Defendants' Motion for Summary Judgment which Order was filed October 8, 1985. Petitioner's Notice of Appeal was mailed at 5 p.m. on Wednesday, November 6, 1985,

from Billings, Montana to Cheyenne, Wyoming, two days prior to the filing deadline of 5 p.m. on Friday November 8, 1985. Petitioner mailed same notice, regular mail after being advised by the Billings, Montana Postmaster that the letter would arrive in Cheyenne, Wyoming on Thursday, November 7, 1986. A copy of Petitioner's Notice of Appeal is appended hereto as Appendix B. A copy of Petitioner's affidavit evidencing these mailing facts is appended hereto as Appendix C.

November 8, 1985 was a Friday; November 9 a Saturday; November 10 a Sunday; and November 11, Monday, was Veteran's day a national holiday. The filing time stamped on the Notice of the Appeal on Tuesday, November 12, 1985 was 9:10 a.m.

Petitioner LaFountain has been advised by the Clerk of Court in Cheyenne, Wyoming that mail is picked up from the Court's post office box at 8 a.m. and checked again right after lunch daily. Appendix D is appended hereto regarding this conversation. The Court is closed on weekends and holidays.

SUMMARY OF ARGUMENT

Petitioner asserts that his mailing was properly done and reasonably calculated to allow for delivery to the District Clerk Court's office for timely filing by November 8, 1985 and that the Clerk of Court's custody by November 8, 1985 can be presumed under the set of circumstances described herein. Further, that custody by The District Clerk of Court is tantamount to proper and timely filing which effectively vested the Circuit Court with appellate jurisdiction.

ARGUMENT

Issue: Whether the Circuit Court of Appeals erred in its dismissal of the appeal of Petitioner as untimely and consequently ineffective to vest the Circuit Court with appellate jurisdiction.

The Clerk of Court of the U.S. District Court in Cheyenne, Wyoming verified that there is an afternoon gap in the Court's mail schedule. Under this schedule there would have been no pickup of mail from the Court's mailbox on Friday afternoon, November 8, 1986 except right after lunch. Any mail put in the Court's mail box beyond early afternoon would not have been picked up until the next week's first business day...in this case, Tuesday, November 12, 1985 at 8:00 a.m. Or it may have been picked up on Friday morning or early Friday afternoon without being stamped as filed until 4 days later due to the holiday weekend. In either event, the receipt by the District Court Clerk of Court was timely and the Notice of Appeal was properly filed.

The unique circumstances of this case as well as the reasonable actions of mailing and expectation of delivery of the notice by the November 8, 1985 5:00 o'clock p.m. delivery deadline demonstrate the propriety of jurisdiction in the Circuit Court of Appeals. And caselaw is clear as to custody of such mail lying in the recipient, here the District Court Clerk.

Petitioner also asserts that the unique facts of a situation can excuse any non-compliance with the general rules as to the 30-day notice requirements where injustice otherwise would result. *United States v Miles* (1975, CA 4 Md) 510 F2d 1362; *USM Corp. v GKN Fasteners, LTD.* (1978 CA 1) 587 F2d 21. Caselaw even recognizes that notice mailed to a district judge in time to have been

received by him in normal course is held sufficient. *Halfen v. United States* (10th Cir. 1963) 324 F 2d 52. And notices of appeal are entitled to liberal construction where the adverse party is not prejudiced. *Scherer v Kelley* (1978 CA 7 Ill.) 584 F 2d 170, 9 9 S. Ct. 1511.

Petitioner timely filed but he had no control over the entry of filing time. Although the filing time is listed as 9:10 a.m., Tuesday, November 12, 1985, the filing actually occurred earlier. A notice of appeal is deemed filed when the District Court receives custody of it. *Graves v General Ins. Corp.* (1967, CA 10 NM) 381 F. 2d 517. The question then becomes "when"? And, secondly, do the facts justify applying the fairness test?

The fact is clear here that the District Court Clerk did not check the Friday November 8, 1985 mail at the District Court mailbox beyond "after lunch", whenever that may be. This means from approximately 2 p.m. through 5 p.m. any custody of mail by the District Court would not be apparent to the Clerk. The custody would exist in the Court then, however; Petitioner would have had no control over such mail; and the filing would have been complete although the Clerk had not stamped a time and date. If a notice of appeal is mailed sufficiently before the deadline, a presumption arises that the clerk obtained custody of the notice of appeal before the deadline. *Hegler v. Board of Education* (1971, CA 8 Ark) 447 F 2d 1078. The presumption is that the notice of appeal was in the Court's mailbox before the deadline even though the clerk did not take it out of the mailbox and mark it filed until after the deadline. *Hegler v. Board of Education* (1971, CA 8 Ark) 447 F 2d 1078. The appellant is not responsible for filing delays in The District Court Clerk's office. *Aldabe v. Aldabe* (1980) CA 9 Cal 616 F. 2d 1089.

The Court of Appeals for the Tenth Circuit appears to have, in ignoring the issue of custody as the determining factor, rendered a decision that is in conflict with its own 1967 decision in *Graves*, cited above, and in conflict with the decisions in *Hegler* and *Aldabe*, each cited hereinabove, both of which consider the custody of mail issue and the presumption of such custody as long as the notice was mailed sufficiently before the deadline. Appendixes B, C and D appended hereto, provide evidence sufficent to raise the presumption of custody of the notice in the District Court Clerk.

The inconsistency of the mailing and appeal jurisdiction issue raised by these facts make it clear that this is an important question of federal law which has not been, but should be settled by the Supreme Court.

The need for some flexibility in applying fundamental fairness tests dictates that stringent rules that would not recognize the custody test would not be appropriate.

CONCLUSION

The Circuit Court, for the Tenth Circuit erred in its dismissal of the Appeal of Petitioner Robert E. LaFountain as untimely and consequently ineffective to vest the Circuit Court with Appellate jurisdiction because filing was effected timely upon the District Court Clerk's obtaining custody of the notice of appeal. The dismissal should be reversed and the cause returned to the Circuit Court for disposition pursuant to the appellate procedures which follow the timely and proper filing of a notice of appeal.

Respectfully Submitted,
ROBERT E. LAFOUNTAIN
PRO-SE
908 Crist Drive
Billings, Montana 59105

May 21, 1986

APPENDIX

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 85-2733
(D.C. No. C84-0234-Bl)
(D. Wyo.)

ROBERT E. LAFOUNTAIN,
Plaintiff-Appellant,

v.

TOWN OF SARATOGA, a Wyoming Municipal, corporation and SUE ELLIS, JOE GLODE, JIM ELSENSOHN AND DORMAN EWING as members of the Saratoga Town Council and each of the aforementioned individually, personally, jointly and severally,
Defendants/Appellees.

ORDER AND JUDGMENT

Before McKAY AND SEYMOUR, Circuit Judges.

In accordance with 10th Cir. R. 9(e) and Fed. R. App. P. 34(a), this appeal came on for consideration on the briefs and record on appeal.

This matter is before the court on appellees' motion to dismiss and appellant's response thereto.

The threshold question is whether this court has appellate jurisdiction. The judgment appealed from was entered on the docket on October 9, 1985. The time prescribed by Fed. R. App. P. 4(a)(1) and 28 U.S.C. § 2107 for filing a proper notice of appeal expired on November 8, 1985. Appellant's notice

of appeal was not filed until November 12, 1985. There is no indication that an extension of time to file a notice of appeal pursuant to Fed. R. App. P. 4(a)(5) was either sought or granted in the district court.

The rules in this type of case are quite clear. A notice of appeal filed within the time prescribed by statute, or a proper extension thereof, is both mandatory and jurisdictional. Gooch v. Skelly Oil Co., 493 F.2d 366 (10th Cir.), *cert. denied*, 419 U.S. 997 (1974). We conclude that the notice of appeal in this case was untimely and consequently ineffective to vest this court with appellate jurisdiction.

APPEAL DISMISSED.

HOWARD K. PHILLIPS, Clerk

Feb. 26, 1986

APPENDIX B
IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

C84-0234- Bl
NOTICE OF APPEAL

ROBERT E. LA FOUNTAIN

Plaintiff

v.

TOWN OF SARATOGA, A Wyoming Municipal Corporation; and,
SUE ELLIS, JOE GLODE, JIM ELSENSOHN AND DORMAN EWING,
as members of the SARATOGA TOWN COUNCIL; and,
each of the aforementioned individually,

Defendants.

Notice is hereby given that Robert E. La Fountain, the plaintiff above named, hereby appeals to the United States Court of Appeals for the Tenth Circuit from the Order granting Defendants' Motion for Summary Judgment entered in this action on October 8, 1985.

Dated this 6th day of November, 1985.

LA FOUNTAIN LAW FIRM

S/
GERALD P. LA FOUNTAIN

S/SNG
ROBERT E. LA FOUNTAIN
Plaintiff

APPENDIX C
IN THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Case No. 85-2733
AFFIDAVIT OF ROBERT E. LA FOUNTAIN

ROBERT E. LA FOUNTAIN

Plaintiff

v.

TOWN OF SARATOGA, A Wyoming Municipal Corporation; and,
SUE ELLIS, JOE GLODE, JIM ELSENSOHN AND DORMAN EWING,
as members of the SARATOGA TOWN COUNCIL; and,
each of the aforementioned individually,

Defendants.

ROBERT E. LA FOUNTAIN, being first duly sworn, deposes and says:

1. That he is the plaintiff in the case herein;

2. That he has been without local Wyoming counsel since filing of the summary judgment objection on approximately September 20, 1985, and is now pro-se in the case before this court as a result of inability to obtain Tenth Circuit licensed counsel.

3. That on November 6, 1985, two full days prior to the 30-day Notice of appeal deadline, he did hand deliver to the postmaster his notice of appeal letter for mailing to Cheyenne, Wyoming;

4. That upon personal hand delivery of the notice of appeal to the Billings postmaster, he was assured that mail from Billings to Cheyenne would in the normal course of the U.S. mails, arrive in Cheyenne on the next day, November 7, 1985.

5. That in reliance upon same postmaster's assurances, he did hand the letter to the postmaster who said it would go out in the 6:30 evening mail that same day;

6. That the envelope which contained the notice of appeal will demonstrate mailing on November 6, 1985.

DATED this 17th day of December, 1985.

S/
ROBERT E. LA FOUNTAIN

STATE OF MONTANA)
: ss.
COUNTY OF YELLOWSTONE)

On this 17th day of December, 1985, before me, the undersigned, a Notary Public for the State of Montana, personally appeared Robert E. La Fountain, who executed the within instrument.

IN WITNESS WHEREOF, I have hereunto set my hand and affixe my official seal the day and year first above written.

S/ Sally Grimsrud
Notary Public for the State of Montana
Residing at Billings, Montana: My
Commission expires: 3/5/88

APPENDIX D
IN THE
SUPREME COURT
OF THE UNITED STATES

AFFIDAVIT OF ROBERT E. LAFOUNTAIN

ROBERT E. LA FOUNTAIN

Petitioner,

v.

TOWN OF SARATOGA, A Wyoming Municipal Corporation; and,
SUE ELLIS, JOE GLODE, JIM ELSENSOHN AND DORMAN EWING,
as members of the SARATOGA TOWN COUNCIL; and,
each of the aforementioned individually, personally, jointly and severally,

Defendants.

ROBERT E. LA FOUNTAIN being first duly sworn, deposes and says:

1. That he is the plaintiff-Appellant in Case No. 85-2733 *Robert E. LaFountain v. Town of Saratoga*, et. al., in the United States Court of Appeals for the Tenth Circuit, and is Petitioner herein;

2. That on November 6, 1985, at approximately 5:00 p.m., two full days prior to the 30-day Notice of Appeal deadline, he did hand deliver to the postmaster in Billings, Montana, his notice of appeal letter for mailing to Cheyenne, Wyoming;

3. That upon personal hand delivery of the notice of appeal letter to the Billings postmaster, affiant was assured that mail from Billings to Cheyenne would, in the normal cause of the U.S. mails, arrive in Cheyenne on the next day, November 7, 1985.

4. That in reliance upon same postmaster's assurances, affiant did hand the notice letter to the postmaster who said it would go out in the 6:30 evening mail that same day;

5. That in early April, 1986 affiant was advised by telephone conversation with the District Court Clerk's office in Cheyenne, Wyoming that mail is picked up from the Court's post office box at 8:00 a.m. and is checked againt right after lunch daily, a total of two times per day;

6. That affiant was advised by Mr. Charles Nagashima, postmaster in Billings, Montana, on April 22, 1986 that if a letter was mailed on Wednesday, November 6 by 5:00 o'clock p.m. it would routinely be into the post office box in Cheyenne, Wyoming by 3:00 o'clock p.m. the next day, Thursday;

DATED this 21st day of May, 1986.

S/
Robert E. LaFountain

STATE OF MONTANA)
: ss.
COUNTY OF YELLOWSTONE)

On this 21st day of May, 1986 before me, the undersigned, personally appeared Robert E. LaFountain, who executed the within instrument.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year first above written.

S/ Charles S. Snyder

Notary Public for the State of Montana:
Residing at Billings, Montana:
My commission expires: 10/24/86